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No. 200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation ..... Petitioner

vs.

HARTLEY BROTHERS, a Co-partnership composed of F. M. Hartley and T. H. Hartley ..... Respondents

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BRIEF FOR PETITIONER

CONCISE STATEMENT OF CASE.

The Supreme Court of the State of Oklahoma, being the highest court of the State in which a judgment could be had, has affirmed the judgment of the District Court of the County of Rogers, in the State of Oklahoma, in favor of the respondents and against the petitioner. (Tr. 156-158).

The action was brought by the respondents (plaintiff) against the petitioner (defendant) (Tr. 3-4) to recover damages on account of injury to certain cattle involved in the shipment of seven car loads from certain counties in the State of Arkansas to Delaware, in the State of Oklahoma, said cattle being from what is commonly designated as quarantined territory into unquarantined territory with a provision for the unloading of said cattle at the stock pens at Little Rock, Arkansas for dipping. All of the different seven cars moved under the provisions of what is known as the uniform live stock contract, and involved ninety-four head of cattle out of five of the seven cars, forty-four head of which were alleged to have died either prior to the unloading of same at Little Rock for dipping, during the period of dipping, or between Little Rock, Arkansas, and Delaware, Oklahoma. Fifty head of said cattle were alleged to have died after the cattle was removed from the cars and the stock pens of the defendant to pasturage some seven miles away. Respondents further allege that the negligent handling of these cattle resulted in this loss.

Petitioner filed its answer to the petition of respondents, paragraphs two and three of which reads (Tr. 5-6):

"That if the shipment of live stock moved over the railroad of the defendant, as alleged in said petition, that said live stock or cattle, and each and every car thereof, moved under a special live stock contract, which prior to the date of shipment had been filed with the Interstate Commerce Commission, and that under and by virtue of the provisions of said live stock contract, that said defendant did not assume any liability because of the inherent weakness and the poor, thin and weak condition of said cattle, and for injury to same resulting in the over-crowding of them in the cars, and resulting from the stoppage in transit for dipping, nor for the loss of life or injury of said cattle while upon the lines of the original connecting carrier, and that if said plaintiffs lost the number of said cattle as alleged in their petition, that said loss was directly the result of the poor, thin and weak condition of the cattle, and of the over-crowding of same in cars, and from the results of dipping said cattle immediately before shipment at Little Rock in transit, and from loss occurring on original connecting carrier's line and prior to the delivery of said cattle to this defendant, all of which is especially plead as a bar to plaintiffs' right of recovery herein.

"The live stock contract hereinabove referred to, the duplicate originals of which were delivered to and should be in the possession of plaintiffs, provide among other things, 'that before live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock'; and that no such written notice was given or served upon the defendant in connection with the several car loads of cattle upon which the plaintiff's alleged cause of action is predicated, and especially as to the fifty head of cattle which it is alleged died after being removed to and placed upon pasture. And the above clause in the shipper's contract and in the tariffs governing the movement of such cattle is also especially plead as a bar to plaintiffs' right of recovery herein."

To the answer of the petitioner the respondents filed a general denial, and also a special denial which reads (Tr. 6-7):

"They deny that they failed to give notice to the defendant herein of the injury to said cattle under and by virtue of the pro-

visions of said live stock contract referred to in the answer, and in this connection further state that in the event they did fail to give such notice, that the defendant corporation knew of the injured condition of said cattle and had an agent present at the time said cattle were unloaded at Delaware, Oklahoma, and has had full and complete knowledge of said injured condition of said cattle as these plaintiffs, and that no necessity existed for the giving of said notice. These plaintiffs state further that if they failed to give such notice, the failure to do so has been waived by the defendant by accepting a written claim thereafter on the part of these plaintiffs and considering the same and disallowing the same upon the grounds other than the failure to give such notice as the defendant pleads is necessary to be given."

During the progress of the trial of the case the uniform live stock contract pertaining to each of the cars of cattle involved were offered and admitted in evidence without objection (Tr. 83), and with reference thereto attorneys for both the petitioner and respondents stipulated over their signatures as follows (Tr. 114):

"It is hereby stipulated by and between

the attorneys for both plaintiffs and defendant that the uniform live stock contracts offered and admitted in evidence as to each of the cars of cattle in question, were at the time of the execution of same published and on file with the Interstate Commerce Commission and that the same may be used in this case without being formally certified by the Secretary of the Interstate Commerce Commission."

Each of said contracts contain provisions which read (Tr. 88-89):

"Section 2. (c) Claims for loss, damage or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery had elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of

claim shall be required as a condition precedent to recovery."

"Section 4. (c) Before the live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock."

The respondent, T. H. Hartley, among other things, testified (Tr. 48) that following the delivery of the cattle contained in the shipments referred to, he filed a claim with the petitioner (Tr. 49), the claim was for 46 head of cattle at $24.00 per head including freight, or $1104.00, this being the number of cattle which respondents claimed was short against the checking of said shipments at the point of origin and at the point of delivery.

The agent of the petitioner at the point of delivery (Tr. 122-131) identified receipts executed by the consignee, as shown by the live stock contracts, whom it appears from the testimony during the progress of the trial, was agent for the respondents, in which all of the cattle involved in the different shipments, except those for which the claim referred to above was filed, was receipted

for, which receipt, among other things, provides (Tr. 122-131):

"Received in good order for account of consignee" and specifying the number of cattle actually received. But included in their suit for damages was fifty additional head of cattle, which they allege died after they were carried out to respondent's pasture."

No written notice of any kind was ever served on petitioner, and no claim was ever made prior to the commencement of this action, which was more than eleven months after the delivery of the cattle, for the fifty head which had been receipted for in good order upon their delivery at destination.

The trial court, over the objections of petitioner, in connection with the provisions of the live stock contract, instructed the jury, among other things, as follows (Tr. 147-148):

"And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any visible or manifest injury to that portion of the live stock which the plaintiffs allege died subsequent to their removal from the posses-

sion of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury thereto.

"However, you are further instructed that the notice as provided for in said contract **may in certain cases be waived**, and, in the event that you should find under the facts and circumstances in this particular case that the said injuries complained of were visible and manifest and could have been observed by the station agent by the exercise of ordinary ability, then and in that event the said notice would not have to be served upon the said defendant as provided for in said contract."

The jury returned a verdict in favor of respondents for $1750.00 (Tr. 151). Motion for new trial was filed (Tr. 151-152), in which the court's attention was particularly called to the instruction quoted above. The motion for new trial was overruled, and petitioner appealed the case to the Supreme Court of the State of Oklahoma, which said Court, on the 20th day of December, 1932, filed its opinion (Tr. 156-158), reported in 162 Okla. p. 194, in which the judgment of the

trial court was affirmed, paragraph two of the syllabus of the opinion, reads:

> "Under a uniform shipper's contract based upon the Act of Congress March 4, 1915, 38 Stat. at Large 1196, amendatory of former Acts, a plaintiff is not required to file a claim within the time specified in the contract where the loss or damage for which recovery is sought occurred while a shipment of cattle was in transit as a result of the carelessness or negligence of the carrier."

And in the body of the opinion, the Court says:

> "It is our view that a decision as to waiving of notice in the contract presented is not necessary to the determination of this cause for the recovery herein sought was for damage in transit occasioned by the negligence and carelessness of the defendant carrier."

The shipment out of which this litigation originated was contracted for on May 4, 1927 (Tr. 4), and was delivered at destination by petitioner May 14, 1927 (Tr. 123-131). Claim for the loss of 46 head of the cattle involved in said shipment was filed with petitioning carrier June 30, 1927

(Tr. 49). Suit was commenced by respondents to recover for the loss of the 46 head plus 46 additional head on April 3, 1928, and amended petition was filed May 29, 1928 (Tr. 3).

II.

Following the filing of the Supreme Court's opinion, and within the time provided by the rules of the court, the petitioner filed its petition for rehearing, in which the errors of the Supreme Court of the State of Oklahoma were given in the following assignments (Tr. 158-160):

"1. The court erred in finding as a matter of fact, and in holding as a matter of law, that based upon the evidence in this case, as disclosed by the record, that it was not necessary for the defendants in error to comply with the provisions of the uniform live stock contract forming the basis of this action, by giving to the plaintiff in error notice of injury to the cattle in question before removing the same from the plaintiff in error's premises, or permitting them to co-mingle with the other cattle.

"2. The court erred in disregarding, as

a matter of fact, and failing to give effect to the undisputed testimony that the cattle which died after delivery to the defendant in error and removed from the plaintiff in error's premises were receipted for by the defendants in error at the time of said delivery, as being in good condition and without exception.

"3. The court erred in holding, as a matter of law, that the undisputed fact that the original claim was filed by the defendants in error covering the cattle injured and dead prior to the delivery when taken in connection with their failure to file an amended or supplemental claim within nine months thereafter for the remaining 50 head of cattle forming the basis of this action was without any probative force in estopping the defendants in error from enlarging said claim by suit to cover the additional 50 head which was receipted for in good condition and removed from plaintiff in error's premises, and alleged in the suit to have died thereafter.

"4. The court erred in holding, as a matter of law, that the trial court did not err in instructing the jury that the provisions of the uniform live stock contract under which the

shipment in question were transported, and which was a part of the tariffs in force and on file with the Interstate Commerce Commission, could be waived.

"5. The court erred in finding and holding, as a matter of law, that the provisions of the uniform live stock contract above referred to, which provides that under certain conditions the claim for loss or damage must be filed within nine months after date of delivery was not effective as a defense to that portion of the shipment which was receipted for by the defendants in error in good condition and removed from plaintiff in error's premises, and which was included after the expiration of nine months, and which was not covered by the original claim."

Thereafter and on February 28th, 1933 (Tr. 160), the Supreme Court of the State of Oklahoma overruled and denied petitioner's petition for a rehearing, and thereafter petitioner made application to, and secured an order from the Supreme Court of the State of Oklahoma staying execution for ninety days from and after March 27th, 1933 to file its petition for certiorari in the Supreme Court of the United States.

III.

JURISDICTION

This Court has jurisdiction to review this case, under the provisions of the Elkins Act as amended by an act to further regulate commerce with foreign nations a..d among the States, Feb. 19, 1903, as amended, U. S. Code, title 49, Section 41, 32 Stat. L., 847; 34 Stat. L., 548, and the Interstate Commerce Act, U. S. Code, title 49, Chapter 1, Section 20, as amended, 38 Stat. L., 1197; 44 Stat. L. 1446. Also Sec. 237 Judicial Code (U.S.C.S. 344) (as amended, Act of February 13, 1925, Ch. 229, 43 Stat. 937.)

Since the record discloses that the shipments out of which this litigation originated was in interstate commerce, and based upon what is known in railroad parlance as "uniform live stock contract", and said contract being admittedly published and on file in the office of the Interstate Commerce Commission at the time the shipment originated and under which it was delivered, and the pertinent portions of said contract, including the provisions sought to be construed in this case, which read:

"Sec. 1. (a) Except in the case of its negligence proximately contributing thereto,

no carrier or party in possession of all or any of the live stock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

And

"(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright or fire caused by the shipper or shippers' agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

And

"(c) Except in the case of its negligence

proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damage it may be required to pay by reason thereof.

"Section 4, Paragraph (a). The shipper at his own risk and expense shall load and unload the live stock into and out of cars.

And

"(c) Before the live stock is removed from the possession of the carrier or mingled with other live stock, the shipper, owner, consignee or agent thereof shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock."

This Court has jurisdiction to review the judgment of the Supreme Court of the State of Oklahoma, and to construe the provisions of the contract in the light of the Acts of Congress dealing with the question of interstate commerce.

IV.

SPECIFICATION OF ASSIGNED ERRORS

1. The Supreme Court of the State of Oklahoma erred in sustaining the trial court in giving in charge to the jury an instruction to the effect, that the requirement of notice under paragraph (c) of Section 4 of the uniform live stock contract, under certain conditions, may be waived.

2. The Supreme Court of the State of Oklahoma erred in holding, in effect, that paragraph (c) of Section 2 of the uniform live stock contract did not apply to the approximately fifty head of cattle which were admittedly receipted for at point of delivery, in good condition, and for which no claim for loss or damage was filed within six months thereafter, and no notice of their intention to file a claim for same was given, the first demand made upon petitioner being when the suit was filed for damages for said stock ten and one half months after their delivery to respondents.

ARGUMENT AND BRIEF

The facts leading up to the questions involved here, as indicated by the petition in error and statements heretofore made in this brief as supplemented by the record, discloses that the shipment of cattle in question, out of which this litigation arose, consisted of seven cars, four of which originated at Malvern, Arkansas on the Missouri Pacific Railroad lines, two at Leola, Arkansas on the Rock Island lines, and one at Ladelle on a small branch line; all of the cars in question finally being delivered to the petitioner at Little Rock, Arkansas, where the same were dipped preparatory to being transported from Little Rock, Arkansas to Delaware, Oklahoma. The Ladelle car went through without exceptions, and one of the other cars also went through without exceptions, and the last five cars, which were loaded with 293 head of stock were delivered at destination, and receipted for in good order, with the exception of ten head, which were noted as 'deads and downs'. The ten deads or downs which were noted on the receipt of the last five cars, plus those that died or were left in the dipping pens at Little Rock, Arkansas, showed a difference between the original number of cattle called for at the point of loading in the seven cars, and

between those that were checked out of the seven cars at Delaware, Oklahoma, of forty-six head.

The respondents, within about six weeks after the final delivery of the cattle, filed a claim for said forty-six head at $24.00 per head. The claim was not settled by the petitioner, since it included some injured and dead in the cars that originated on the Rock Island lines, and before they were delivered to the petitioner, and also those that died during the dipping period in the pens at Little Rock, for which the petitioner disclaimed liability under the terms of the contract.

No notice, under the terms of the contract was given the petitioner of their intention to file claim on any portion of the cattle which were receipted for at destination in good order, and no claim was filed prior to the commencement of this suit for the approximately fifty head which respondents sought and secured a recovery for in this action.

It is the contention of the petitioner that both the trial court and the Supreme Court of the State of Oklahoma erred in their refusal to give effect to the clauses of the contract which provides for the giving of notice and also in limiting the time to six months in which to file claim.

The particular portion of the contract referred to being section 2 (c), which reads (Tr. 88):

"Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the the delivery of the live stock (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury or delay shall be instituted only within two years and one day after delivery of the live stock, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed; or Provided, that in case of the claim on which suit is made was based in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is re-

quired as a condition precedent to recovery) suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof, specified in the notice."

And when taken in connection with instruction number 4, which was given in charge to the jury by the trial court, over the exceptions of petitioner and confirmed by the Supreme Court of the State of Oklahoma, to which appropriate assignments of error is directed, said instruction Number 4 referred to being as follows (Tr. 147-148):

"4. There is a further provision in said contract as follows:

"Section 2. (c) Claims for loss, damage, or injury to live stock must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after the delivery of the live stock (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for deliv-

ery has elapsed; provided, that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

"And you are further instructed that if you find from the testimony that the plaintiffs failed to comply with the contract by informing the defendant, in writing, of any visible or manifest injury to that portion of the live stock which plaintiffs allege died, subsequent to their removal from the possession of the defendant, then and in that event the plaintiffs cannot recover as to any of said live stock thereafter dying, or for any injury theerto.

"However, you are further instructed that the notice as provided for in said contract may in certain cases be waived, and, in the event that you should find under the facts and circumstances in this particular case that the said injuries complained of were visible and manifest and could have been observed by the station agent by the exercise of ordinary ability, then and in that event the said notice would not have to be served upon the said defendant as provided for in said contract."

presents the legal questions involved in petitioner's assignments of error.

Dealing first with the legal effect of paragraph (c) of Section 4 of the uniform live stock contract, we beg to call the attention of the Court to the case of Reedy v. Mo. P. R. Co. (Kansas), opinion rendered July 9, 1927, paragraph two of the syllabus of which reads (255 Pac. 683):

> "An interstate live stock contract provides as a condition precedent to recovery of damages, that before the live stock is recovered from the possession of the carrier or mingled with other live stock, the shipper, owner or consignee, or the agent thereof, shall inform, in writing, the delivering carrier of any visible or manifest injury to the live stock. Held, the provision covers loss or damage to the live stock during transportation, and includes shrinkage in weight of the live stock during transportation."

And further held:

> "The burden is on the shipper to provide notice as provided in the contract, and if he fails to do so he cannot recover for loss or damage to the live stock during transportation."

And in the body of the opinion, the language of the clause in the contract is quoted in full and exactly in the same language as the contract under consideration in this case. And in discussing same in the opinion, the court, among other things, said:

> "The provisions, however, covers loss or damage to the live stock during transportation and manifestly covers any shrinkage to the live stock during transportation. (Citing cases). It also covers animals that died or were crippled in transportation." (Citing cases.)

In the case of Manby v. Union Pacific R. Co., 10 Fed. (2nd Ed.), page 327, the legal effect of a provision as to notice of claims for damages contained in the shipper's contract is under consideration by the court, and the court held:

> "That filing of such claim (within the time specified in the contract) is a condition precedent to recovery."

And further held:

> "That shipper's letter to railroad general freight agent stating that shipment was diverted, and asking by whose authority sheep

were delivered to person other than consignee, and his subsequent letter stating that he never authorized change of consignee, held not to satisfy bill of lading requirement that definite written claim, specifying character and amount of claim shall be made within four months after delivery should have been made."

And that:

"Shipper's oral conversation with the railroad's live stock agent respecting misdelivery was insufficient to satisfy bill of lading requirement for written notice of claim, or as a definite written claim specifying the character and amount of claim to be filed with the carrier's station agent at the point of origin or destination."

In the case of Davis v. Roper Lumber Co., 70 U.S. L. ed., page 209, and in the body of the opinion, the court, among other things, said:

"Respondent contended that under Section 10 of the Bill of Lading Act it was not necessary to comply with the requirements of the bill of lading. The point is without merit. x x x x There is nothing in the statutory provisions relied on by respondent to excuse

failure to make claim within the time specified in the shippers' contract."

And in the case of Mo. P. R. v. Porter, 171 U.S. L. ed., page 672, in the body of the opinion, the court, among other things, said:

"The general regulation of the issues, form and substance of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shipper's property by fire etc."

And in the case of Abell v. A.T. & S. F. R. Co. (Kansas), 164 Pac. 269, the court in stating the law of the case in the syllabus, said:

"Where parties stipulated in a contract for an interstate shipment of live stock, that before there could be a recovery against the carrier for loss or injury to the stock occurring during transportation or previous to the unloading thereof, the shipper or his agent in charge of the cattle must give written notice of his claim to an officer of the company or the station agent before the stock are removed from the place of destination, or before they are slaughtered or intermingled

with other stock. The carrier may not, under the federal law, waive the requirements of written notice of such claim by the shipper nor dispense with notice of a claim from one shipper and require it from another, and without written notice there can be no recovery, although the carrier may have had actual and complete notice of the claim of the shipper."

The above syllabus is supported by a well-reasoned opinion, in which the reasons and purposes of the holding that provisions in shipper's contracts cannot be waived is discussed and supported by citation of authorities.

In the case of Southern R. Co. v. Prescott, 60 L. ed. U.S., page 836, the court, among other things, said:

"It is also clear that with respect to the service given by the federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates, and to the established principles applied equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services

within the purview of the act. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations."

In the court's instruction number 4, it will be noted that the clause of the contract copied by the court, provides that claims must be filed within six months, etc., and that notice of claim under certain conditions might be waived.

The five cars of cattle, out of which this suit originated, were delivered to the plaintiffs on May 14, 1927, and they commenced their action by the filing of their original petition in this case on April 3, 1928, almost ten and one-half months thereafter, and that the only written notice or claim which was filed in the meantime was the one filed with the defendant's agent at Delaware on June 30, 1927, said claim being for only forty-six head of cattle at $24.00 per head, whereas they sued, after the expiration of both six and nine months, for ninety-six head of cattle at $30.00 per head.

The defendant contends that taking the most favorable view of the contract as it affects the plaintiffs, that the most they could have legally

brought suit for was the forty-six head as originally claimed, and at a price of not to exceed $24.00 per head, and that instruction number 4 as given by the court was erroneous and prejudicial, both as to the giving of written notice of intended claim, and filing of claim, and the waiver thereof.

In the case of In Georgia F. & A. R. Co. v. Blish Mill Co., 60 L. ed. U.S., page 948, the court, in discussing a provision of interstate bill of lading which was being urged the carrier had waived, the court said:

> "The parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act, nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to the conduct and hold the carrier to a different responsibility from that fixed by the agreement made under published tariffs and regulations. A different view would antagonize the plain violation of the act and open the door to the very abuse at which the act is aimed."

In the case of Dean v. Southern R. Co. (S.C.) 91 S.E., page 1042, the court, among other things, said:

"As a defense to the action, defendant alleged and the proof showed that plaintiff had not given written notice of his claim for damages in compliance with the following stipulation in the bill of lading, "that as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock", and against objection of the defendant, the court admitted testimony which plaintiff offered to show waiver of the written notice required by the stipulation, and instructed the jury that although the stipulation was valid and binding upon the parties, nevertheless it could be waived by the defendant, and submitted to them the question whether in fact it had been waived, and instructed them further that unless they found from the evidence that it had been waived their verdict should be for the defendant. While the exceptions challenged the correctness of other rulings and instructions, we need consider only the one above stated, as

that will be decisive of the case. (citing authorities), x x x but more recent decisions of the Supreme Court of the United States, whose decisions are controlling, show that such a stipulation in an interstate bill of lading, if valid and applicable, cannot be waived." (Citing authorities.)

In the case of M. K. & T. R. Co. v. Ward, 61 L. ed. U.S., page 1213, it was held:

"The shipper cannot waive the stipulations in such contracts any more than a carrier can."

The uniform live stock contract which was published and on file with the Interstate Commerce Commission at the time the shipment out of which this suit originated, assumed the status of a statute and fixed the relationship, rights and remedies of the parties to same, and the terms thereof could not be waived, abridged or set aside or modified by either the shipper or the carrier.

In the case of Pillsbury Flour Mills Co. v. Great Northern R. Co., 25 Fed. (2nd Ed.), page 66 (Eighth Circuit), the court, in the various paragraphs of the syllabus, lays down the rule in com-

pliance with the above suggestion. And in the body of the opinion the court said:

> "The rights of the shipper against the carrier are determined by the law through the provisions of the tariffs which are embodied in the applicable published rate. Citing B. & O. S.W. R. Co. v. Settle, 67 L. ed. U.S., page 189."

And:

> "The tariff, so long as it is of force, is, in respect of rates named, to be treated as though it were a statute binding as such upon the railroad and shipper alike." Citing cases.

And in discussing the matter of the construction of the rules and tariffs, section 501, 13 C.J., page 538, is quoted with approval, as follows:

> "Where, however, both the general and special provisions may be given reasonable effect, both are to be retained."

In the case of Beaumont S.L. & W. Ry. Co. v. Magnolia Provisions Co., et al., 26 Fed. (2nd Ed.), page 72, this court, in the body of the opinion, among other things, said:

"The Supreme Court has held that a published tariff's rate is to be treated as though it were a statute, binding both upon the carrier and the shipper, (citing authorities), and it is well settled by the Supreme Court decisions that these provisions of the law must be strictly complied with, because it is necesary to carry out the purposes of Congress to prevent unjust discrimination." (Citing authorities.)

And:

"The Interstate Commerce Commission announced the rule that proof of error in a publication of rates does not justify a departure from the published rates even though the shipper has full knowledge that the rate was published by mistake, and that decisions were cited with approval by the Supreme Court in the case of Davis v. Portland Seed Co., 68 L. ed. U.S., page 762."

The decision further holds, in effect, that the aggrieved parties' remedy is by application to the Interstate Commerce Commission for a correction or modification of the published tariffs and rules rather than attempt to evade same through the courts.

In the case of Douglas Shoe Co. v. Pere Marquette Co. (Mich.), 217 N.W., page 12 the court held:

> "The fact that a carrier has actual knowledge of a shipper's loss, does not excuse the shipper from filing a claim."

CONCLUSION

We respectfully submit that the questions involved are important to the railroads of this country, since they seek a construction by this Court upon the provisions of the uniform live stock contract which is in universal use by all of the carriers by rail in connection with live stock movements in interstate commerce in this country; said contract having been prepared subsequent to the amendments of both the Elkins and Carmack Acts of Congress dealing with interstate commerce and the amendments thereto, and having been published and filed with the Interstate Commerce Commission, as required by the different Acts of Congress dealing with that subject; it being our contention that these provisions of

the contract, under the law, as construed by the courts, are just as binding and effective as if they were Acts of Congress itself.

Respectfully submitted,

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